

64 Withdrawn

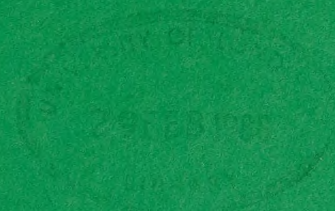


The Law Commission

Working Paper No. 106

Trusts of Land

Overreaching



LONDON
HER MAJESTY'S STATIONERY OFFICE
£2.25 net

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the Law.

The Law Commissioners are:

The Honourable Mr. Justice Beldam, *Chairman*
Mr. Trevor M. Aldridge
Mr. Brian Davenport Q.C.
Professor Julian Farrand
Professor Brenda Hoggett

The Secretary of the Law Commission is Mr. Michael Collon and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

This working paper, completed on 8 January 1988, is circulated for comment and criticism only. It does not represent the final views of the Law Commission. The Law Commission would be grateful for comments on this working paper before 30 June 1988.

All correspondence should be addressed to:

Mrs. C.M. Hand,
Law Commission,
Conquest House,
37-38 John Street,
Theobalds Road,
London,
WC1N 2BQ.

Tel: 01-242 0861 Ext. 237

It may be helpful for the Law Commission, either in discussion with others concerned or in any subsequent recommendations, to be able to refer to and attribute comments submitted in response to this working paper. Whilst any request to treat all, or part, of a response in confidence will, of course, be respected, if no such request is made the Law Commission will assume that the response is not intended to be confidential.

The Law Commission

Working Paper No. 106

Trusts of Land

Overreaching

LONDON
HER MAJESTY'S STATIONERY OFFICE

© Crown copyright 1988
First published 1988

ISBN 0 11 7301 88 4

THE LAW COMMISSION
WORKING PAPER NO. 106

TRUSTS OF LAND
OVERREACHING

CONTENTS

	<u>Paragraphs</u>	<u>Pages</u>
<u>Summary</u>		iv
1. <u>Introduction</u>	1.1 - 1.5	1 - 5
2. <u>Statutory provisions</u>	2.1 - 2.4	6 - 10
3. <u>Protection for beneficiaries</u>	3.1 - 3.3	11 - 17
4. <u>Flegg's case</u>	4.1 - 4.6	18 - 22
5. <u>Overreaching and overriding since Boland</u>	5.1 - 5.4	23 - 28
6. <u>Options</u>	6.1 - 6.14	29 - 41
Proposal I : cautions and land charges	6.3 - 6.4	31 - 32
Proposal II : no overriding without consent of occupying beneficiaries	6.5 - 6.12	32 - 38
Proposal III: no overriding unless one trustee is solicitor or licensed conveyancer	6.13	39 - 40
Proposal IV : do nothing	6.14	40 - 41
7. <u>Provisional conclusion</u>	7.1	42
<u>Appendix</u>		
Statutes		

TRUSTS OF LAND

OVERREACHING

Summary

In this working paper, the Law Commission reconsider, as part of our Trusts of Land project, the operation in principle of "overreaching" (i.e. when beneficiaries' interests are detached from land and attached instead to money, usually on sale or mortgage). Work on this topic had to be held over pending the decision of the House of Lords in Flegg's case. In the light of that decision, and bearing in mind problems which can arise because beneficiaries lose the actual enjoyment of land on the occurrence of overreaching, we now offer three possible proposals for reform: that if protected by registration, beneficial interests would be overreached only where the beneficiaries consent; that there should be no overreaching without the consent of every occupying beneficiary of full age irrespective of registration; and that there should be no overreaching unless one trustee is a solicitor or a licensed conveyancer. A fourth possibility considered is that nothing should be done.

The Law Commission provisionally prefer the second of these proposals. However, the purpose of this paper is to obtain the widest possible range of views on all the possibilities, and the observations of the general public will be welcomed as well as the opinions of practitioners and other legal experts.

TRUSTS OF LAND

OVERREACHING

1. Introduction

1.1 Thomas holds a house on trust for himself and Sarah. She lives in the house. Without consulting her, he mortgages the house to a Bank and vanishes with Rachel and the money. Sarah cannot be evicted by the Bank: her interest is "overriding".¹ But if Thomas had appointed Rachel as a second trustee before mortgaging the house, Sarah could be evicted: her interest would be "overreached".² Can these different results be justified?

1.2 The statutory rules determining whether a beneficiary wins or loses, i.e. whether his or her interest is technically "overriding" or "overreachable", appear complicated but tolerably clear. In contrast, the principles upon which the rules are - or should be - based may seem unduly obscure. This obscurity and the need for clarification at least have been highlighted by a recent decision of the House of Lords in which an actual conflict

-
1. Williams & Glyn's Bank Ltd. v. Boland [1981] A.C. 487 H.L. The text assumes the house to be registered land: if title to the land was unregistered, Sarah's interest could not be "overriding" but would probably bind the bank because her occupation would constitute constructive notice of her rights (but cp. Counce v. Counce [1969] 1 W.L.R. 286, referred to with disapproval in the Boland case, particularly per Lord Wilberforce at p. 505 and per Lord Scarman at p. 511).
 2. City of London Building Society v. Flegg [1987] 2 W.L.R. 1266 H.L.

of results called for resolution.³ In addition, the acceptability of the decision not in law but in principle is thought necessarily open to question.

1.3 However, we have already considered "overriding interests" generally⁴ and do not propose to do so again now, although aspects of that consideration must be mentioned as relevant. "Overriding interests" are certain specified rights and liabilities affecting registered land which bind anyone - purchaser or mortgagee, lessee or donee - taking the land even though he knew nothing about them and they were not entered on the register of title. One of these interests is "the rights of every person in actual occupation of the land".⁵ Such occupiers may be beneficiaries under trusts.⁶ We recommended that these rights should continue to be overriding interests.⁷ The general principle upon which this particular recommendation was based is that "interests should be overriding where protection against purchasers is needed, yet it is either not reasonable to expect or not sensible to require any

3. Ibid.

4. Third Report on Land Registration (1987), Law Com. No. 158, A. Overriding Interests. We have not yet turned attention to the doctrine of notice which may still be a significant element in unregistered conveyancing despite the introduction in 1925 of land charges registration and "overreaching". The implications of this doctrine may not be ignored in this paper.

5. Land Registration Act 1925, s. 70(1)(g).

6. Williams & Glyn's Bank Ltd. v. Boland [1981] A.C. 487 H.L.; see also Hodgson v. Marks [1971] Ch. 892 C.A.; but interests under strict settlements will still not be "overriding": L.R.A. 1925, s. 86(2).

7. Third Report above, para. 2.105; and including interests under strict settlements, ibid., para. 2.69.

entry on the register".⁸ We also proposed that a statutory indemnity should be available for honest and careful purchasers (who include mortgagees) suffering loss because of this principle.⁹ At first sight, the particular recommendation as well as the basic principle might be thought completely stultified so long as any "overriding" effect can be easily avoided by operating the "overreaching" machinery.

1.4 This machinery is essentially simple: the purchase money (or the loan) need only be paid to two persons as trustees (or to a trust corporation) in order for the purchaser (or mortgagee) to take the land wholly free from the interests of any beneficiaries. These interests are then and there detached from the land and attached to the money: they are said to be "overreached". This result will happen whether or not the purchaser (or mortgagee) had notice, actual or constructive, of any beneficiary's interests: if he pays his money to two trustees (or to a trust corporation) he need not concern himself in the slightest with the beneficiary's knowledge of or consent to the transaction. Thus, on the one hand, "overreaching" protects purchasers (and mortgagees) and simplifies conveyancing. On the other hand, as a leading text book purports to explain, "Although the beneficiaries lose any

8. Para. 2.6; in para. 2.64 we observed: "The rights of actual occupiers, including in practice most beneficial interests in dwelling-houses, are very often of the sort which arise without express grant, without the grantee or acquirer having the benefit of legal advice, and thus in the same sort of circumstances which lead us to conclusions regarding the retention of easements, rights by adverse possession and short leases as overriding interests. Indeed these expectations and requirements seem to us very likely to be even less reasonable or sensible with the rights of actual occupiers".

9. Para. 2.6.

prospect of enjoying the land itself, they are not defrauded in any way, for they have corresponding interests in the purchase-money".¹⁰ But this short quotation points to the real issue: nowadays many beneficiaries may well feel defrauded, even if the trustees do not vanish with the money, through the very fact of losing their land. This feeling will be the stronger whenever "overreaching" is deliberately set up for this one purpose.¹¹ Accordingly, the operation, in principle rather than in detail, of the "overreaching" machinery for trusts of land should be subjected to critical reconsideration.

10. Sir Robert Megarry & H.W.R. Wade The Law of Real Property 5th ed., (1984), p. 137, where the learned authors add: "This distinguishes overreaching from an interest being overridden, i.e. being void against a purchaser of a legal estate without notice, or for want of registration: if an interest is overreached, it is transferred from the land to money in the hands of trustees; if an interest is overridden, it ceases to be an interest in any property".

11. Thus in our Report on the Implications of Williams & Glyn's Bank Ltd. v. Boland under the sub-heading "Neutralisation of occupiers' rights" we stated:

There are two distinct methods of preventing the enforcement of occupiers' rights against the purchaser. First, the occupier may be persuaded to release his rights. Secondly, an additional trustee may be appointed with the legal owner. We consider these in turn.

(i) Release of rights....

(ii) Appointment of additional trustee. Given that a disposition by two trustees overreaches the beneficial interests, it is plainly to the advantage of purchasers that dispositions should so far as possible be in joint names, whether or not the names of husband and wife. In some cases it appears that sole owners are being asked to arrange for the disposition to be joint, and one consultee went so far as to suggest that loans to sole owners should be refused altogether...."

1.5 This reconsideration is undertaken as part and parcel of our Trusts of Land project.¹² It was held over pending the outcome of the recent appeal to the House of Lords already mentioned.¹³ For the purposes of consultation various proposals were suggested which were summarised as follows:

that there should be a new trust of land with a power of sale; that all settled land should be converted into land held under trusts for sale; that the Settled Land Act should only apply if it is expressed to do so; that there should be a new form of co-ownership which does not involve a trust for sale; and a series of miscellaneous minor reforms.

The provisional policy decided upon by the Commission is to recommend the first of these proposals: a new trust of land. This, however, does not immediately affect the question now under consideration which is the future operation of overreaching which would continue even with the new trust.

11. Continued

((1982) Law Com. No. 115, para. 42). Persuasion must be preferable if possible.

12. See (1985) Working Paper No. 94.

13. See para. 1.2.

2. Statutory provisions

2.1 The device of "overreaching", initially developed by conveyancing practitioners in connection with express trusts for sale as a means of keeping the equities off the legal title, was adopted, extended and elaborated as a basic part of the 1925 property law reforms.¹ The primary provisions are that "a conveyance to a purchaser² of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof" in two cases.³ The first case is, in effect, where the conveyance is made by a tenant for life under the Settled Land Act 1925 and the second where the conveyance is made by trustees for sale. In each case, however, "the statutory requirements respecting the payment of capital

-
1. See Appendix where the relevant statutory provisions are reproduced [i.e. L.P.A. 1925, ss. 2, 10, 14, 26, 27, 42 and 205; S.L.A. 1925, ss. 21, 72, 94 and 95; T.A. 1925, s. 14; L.P.(A.)A. 1926, s. 3].
 2. Both "conveyance" and "purchaser" are widely defined so as to include in particular mortgage and mortgagee: L.P.A. 1925, s. 205(1)(ii) and (xxi).
 3. L.P.A. 1925 s. 2(1)(i) and (ii). According to authoritative annotations in the 12th edition (1932) of Wolstenholme and Cherry's Conveyancing Statutes (editors: Sir Benjamin Cherry, the principal draftsman of the 1925 legislation, assisted by Professor Sir David Hughes Parry, as he later was, and a Mr. Maxwell) at p. 232:

This sub-s. collects and states the various means by which, where a legal estate in land is affected by any one or more equitable interests or powers, that legal estate can be conveyed to a purchaser in such a way that the purchaser is not concerned with the title to the equitable interest or power, or to obtain the concurrence of the owner thereof. On the other hand, the equitable interest is not defeated or destroyed by the disposition, but is shifted so as to become a

money arising" have to be complied with.⁴ These requirements are that payment must be to or by the direction of not fewer than two persons as trustees unless the trustee is a trust corporation.⁵ Interests and powers overreached in this way are of no concern to purchasers or mortgagees.⁶ As Lord Templeman very recently explained:⁷

One of the main objects of the legislation of 1925 was to effect a compromise between on the one hand the interests of the public in securing that land held in trust is freely marketable and, on the other hand, the interests of the beneficiaries in preserving their rights under the trusts. By the Settled Land Act 1925 a tenant for life may convey the settled land discharged from all the trusts powers and provisions of the settlement. By the Law of Property Act 1925 trustees for sale may convey land held on trust for sale discharged from the trusts affecting the proceeds of sale and rents

3. Continued

corresponding interest or power in or over the proceeds. The conveyance to the purchaser is then said to "overreach" the equitable interest or power. The expression "overreach" is not defined in the Act, but this is the sense in which it has been used since 1882. An overreaching conveyance must be distinguished from one which wholly destroys some interest or right, e.g., a conveyance of land affected by a restrictive covenant made after 1925 which is not protected by registration as a land charge.

See also the much less authoritative 13th edition (1972).

4. In the S.L.A. 1925 (s. 117(1)):

"Capital money arising under this Act" means capital money arising under the powers and provisions of this Act or the Acts replaced by this Act, and receivable for the trusts and purposes of the settlement and includes securities representing capital money.

and profits until sale. Under both forms of trust the protection and the only protection of the beneficiaries is that capital money must be paid to at least two trustees or a trust corporation.

It is the sufficiency of this protection which this paper questions.

2.2 Before the questioning begins, however, it should be noticed that "overreaching" can occur without any trust of land. The statutory provisions extend to conveyances by a mortgagee or personal representative.⁸ Here, somewhat surprisingly, there is no requirement that any money be paid to two persons or to a trust corporation, only that it be "paid to the mortgagee or personal representative".⁹ The statutory "overreaching" provisions also apply to

4. Continued

The L.P.A. 1925 contains no similar definition but does refer relevantly to "the proceeds of sale or other capital money" (s. 27(2)).

5. S.L.A. 1925, s. 94 (also s. 72(2)); L.P.A. 1925, s. 27(2); also T.A. 1925, s. 14(2). If this "overreaching machinery" is not properly operated, a conveyance of settled land will not take effect at all: S.L.A. 1925, s. 18(1)(b), (c). In contrast a conveyance of land held on trust for sale would nonetheless itself apparently be effective even though the machinery is mandatory (L.P.A. 1925, s. 27(2)); however, the beneficial interests would not be overreached.
6. L.P.A. 1925, ss. 10, 27(1) and 42; S.L.A. 1925, ss. 72 and 95.
7. City of London Building Society v. Flegg [1987] 2 W.L.R. 1266 at p. 1272.
8. L.P.A. 1925, s. 2(1)(iii), also ss. 88 and 89, and A.E.A. 1925, s. 39.
9. The right of a sole personal representative to give a

conveyances made under an order of the court provided that any money is paid into court or as the court orders.¹⁰

2.3 In addition, it should be noticed that equitable interests or powers not under but having priority to the strict settlement or trust for sale will not be overreached by the simple machinery already mentioned. However, these too can be overreached provided only, in effect, that the trustees are "two or more individuals approved or appointed by the court".¹¹ The court's approval is not subject to any statutory criteria and need not be ad hoc for the purpose of

9. Continued
valid receipt is expressly not affected by the L.P.A. 1925, s. 27(2).

10. L.P.A. 1925, s. 2(1)(iv), also ss. 203 and 204.

11. S.L.A. 1925, ss. 21 and 34; L.P.A. 1925, s. 2(2); T.A. 1925, s. 41. Courts, unlike some settlors, can be very careful when appointing trustees: see Snell's Equity 28th ed., (1982), pp. 204-5:

In making an appointment, the court considers the wishes of the settlor and the beneficiaries,{3} whether the interests of the proposed trustee conflict with those of the settlor or any of the beneficiaries, and whether the appointment will promote or impede the execution of the trust.{4} The court will not appoint a person under disability, nor a person living abroad (unless the trust property or all the beneficiaries are also abroad{5}), nor as a rule a beneficiary or a beneficiary's solicitor or husband or wife, owing to the fact that the trustee may be placed in a position in which his duty and his interest, or two inconsistent duties, conflict{6}; but where there are advantages to be gained from such an appointment, and no disadvantages, the court may make it,{7} though it will be slow to do so.{8}

{3} Re Dickinson's Trusts [1902] W.N. 104 (differing views of beneficiaries: majority prevails).

{4} Re Tempest (1866) 1 Ch.App. 485.

overreaching.¹² Alternatively again there may effectively be a trust corporation.

2.4 Further, certain equitable interests are expressly excepted from "overreaching": (i) interests protected by deposit of legal title deeds; (ii) restrictive covenants; (iii) easements; (iv) estate contracts; (v) registered land charges (other than annuities, limited owners charges and general equitable charges).¹³ The apparent idea was that the first of these ought to be treated as a "paramount interest" whilst "None of the other exceptions could be properly represented in terms of money".¹⁴

11. Continued

{5} Re Freeman's S.T. (1887) 37 Ch.D. 148; Re Liddiard (1880) 14 Ch.D. 310.

{6} Ex p. Clutton (1853) 17 Jur. 988; Re Orde (1833) 24 Ch.D. 271 at 272; Re Kemp's S.E. (1883) 24 Ch.D. 485; Re Coode (1913) 108 L.T. 94.

{7} e.g. Re Marquis of Ailesbury and Lord Iveagh [1893] 2 Ch. 345 at 360.

{8} See Re Earl of Stamford [1896] 1 Ch. 288 at 299; and see Re Spencer's S.E. [1903] 1 Ch. 75.

12. Re Leigh's Settled Estates (No. 2) [1927] 2 Ch 13.

13. L.P.A. 1925, s. 2(3), also subs. (5), and S.L.A. 1925, s. 72(3).

14. Wolstenholme & Cherry 12th ed., (1932), p. 237, authoritative annotations again; cp. fn. 3.

3. Protection for beneficiaries

3.1 The general requirement by law that payments should be made to two trustees or to a trust corporation was novel in 1925.¹ As to this the explanatory comment was made:

The safeguard against mistake or fraud of having at least two trustees or a trust corporation where capital money falls to be received, is a fairly obvious reform; it became essential when additional powers ... to overreach equitable interests were conferred.²

No special qualifications of expertise, character or financial standing, were stipulated for the two trustees, but "trust corporation" enjoys an elaborate and extended definition so as to involve reliability as well as

-
1. Cp. Re Johnson's Settled Estates (1913) 57 Sol. J. 717.
 2. Wolstenholme & Cherry 12th ed., (1932), p. 268, another authoritative annotation to L.P.A. 1925, s. 27(2); cp. fn. 3. Anticipatory explanation can better perhaps be discerned in Cherry's "Memorandum on the Principles and Objects of the Law of Property Bill" which constitutes Appendix IV to the Scott Report (Fourth Report of the Acquisition and Valuation of Land Committee (1919), Cmd. 424). According to para. (v) of the Memorandum, one general principle to be adopted was:

That, to protect the equitable interests and powers thus made to take effect behind the curtain of a trust for sale or a settlement, it is better to provide that the capital money arising from a transaction shall be paid either to a corporation (as a trustee) or to at least two* trustees (being individuals) rather than set up an expensive register of cautions and inhibitions.

A footnote to this states:

responsibility.³ Overall, therefore, beneficiaries under a trust for land may properly be regarded as already placed in a privileged position for the protection of their financial affairs in comparison with beneficiaries under most trusts of other property where there is, as a rule, no requirement of payment to two trustees or a trust corporation. This is not the exercise in which to dissect or disturb general law of trusts' rules as to the necessary number of trustees.⁴ Instead it can perhaps be gratefully recognised that trust corporations can be trusted and that otherwise two heads (containing consciences as well as brains) ought to be

2. Continued

* The Court has always endeavoured to secure that there shall be at least two trustees. This practice has in the past encountered some opposition, but now that the cost of appointing a new trustee out of Court is so small (the statutory powers to make the appointment are nearly always available) there is no longer any room for objection. Apart from the protection against fraud, it is obvious that if investments stand in more than one name the risk of trust property being intermixed with the trustee's private property is eliminated. The Bill does not prevent a trust being wound up by a sole trustee.

But cp. Sir Arthur Underhill in his book of 1926, The Law Relating to Private Trusts and Trustees 8th ed., who said of the change to the absolute requirement for two trustees, "That this will cause great inconvenience can scarcely be doubted, nor is the writer aware of the reasons which led to the insertion of this sub-section" (at p. 219). As to inconvenience, see also (1982) Law Com. No. 115 - our "Boland" report - at para. 42(ii).

3. L.P.A. 1925, s. 205(1)(xxviii); S.L.A. 1925, s. 117(1)(xxx); T.A. 1925, s. 68(18); L.P.(A.)A. 1926 s. 3. See the Public Trustee (Custodian Trustee) Rules 1975, S.I. 1975 1189, for a list of corporations entitled to act as custodian trustees.
4. Even less are we concerned here with charitable trustees, to whom neither the maximum of four nor the minimum of two (for receiving payments) is applied: T.A. 1925, s. 34(3); Re Booth and Southend-on-Sea Estates Company's Contract [1927] 1 Ch. 579. It is true

better than one albeit not as good as four.⁵ Nevertheless "mistake or fraud" as to money matters are not nowadays necessarily the worst worry for beneficiaries: their realistic concern is often with enjoyment of the land itself which will, of course, be lost after "overreaching".

3.2 This is not so much of a concern with strict settlements where the principal beneficiary, the tenant for life, will normally himself have all the relevant powers of disposition as well as the sole right of occupation.⁶ Trusts for sale are a different kettle of fish especially where there are several beneficial co-owners on the boil. As we have elsewhere observed:⁷

The Law of Property Act 1925 imposes a statutory trust for sale wherever land is conveyed to co-owners - whether in equity they are joint

4. Continued

that for some purposes charities are deemed to have settled land (see S.L.A. 1925, s. 29) but:

Unless there is some express provision in the statute it is hopeless to suppose that it can have intended to upset the scheme of management of an old charity like the Salvation Army, known to be governed by one man and intended by its supporters from time to time to be so governed, and to convert its revenue, or any part of it, into capital moneys, and so hamper the carrying out of the trust.

(per Astbury J. in Re Booth etc. at p. 587). Of course, charitable trusts are for purposes, not people, and there will be no beneficiaries, occupying or otherwise, in the private trusts' sense needing direct protection.

5. Four is the maximum permitted number of trustees for any private trust of land: Trustee Act 1925 s. 34 -

"To prevent land from becoming practically unsaleable by the appointment of a large number of trustees..."

Wolstenholme & Cherry Conveyancing Statutes 12th ed. (1932).

tenants or tenants in common.⁸ Thus, wherever a couple buy a house, they become trustees for sale of it although a sale is probably not what they intend. In 1925, owner-occupation of dwellings was far less usual, than nowadays, and where it did exist, it was less likely that a house would be purchased in joint names.⁹ The co-ownership envisaged by the Law of Property Act would have arisen in a different context, where, for example, property was left to children in equal shares. In such a case, a sale at some stage was likely. As far as co-ownership is concerned, a system devised for one set of social circumstances is being used for very different circumstances.

In these different circumstances, therefore, sales or mortgages by whoever happen to be the trustees may occasion the utmost dismay because of consequent evictions. True, if it is just a statutory trust for sale, imposed without any express declaration of trust in almost all cases of co-ownership,¹⁰ the trustees would be under a duty to consult the beneficiaries of full age first and to give effect to their wishes.¹¹ However this may not help much:

6. S.L.A. 1925 s. 38 et seq., s. 106.

7. W.P. No. 94, para. 3.17.

8. L.P.A. 1925 ss. 34-36; Bull v. Bull [1955] 1 Q.B. 234; Williams & Glyn's Bank v. Boland [1981] A.C. 487 H.L.

9. Co-ownership arises when two or more people rent property, as would have been more usual in 1925, but most of the problems seem to occur when the co-owners own the fee simple or a long lease.

10. L.P.A. 1925, ss. 34-6.

11. L.P.A. 1925, s. 26(3); if the beneficiaries disagree the wishes of the majority by value should prevail.

the consultation need only be "so far as practicable", the giving effect to their wishes need only be "so far as consistent with the general interest of the trust" and, in any event, purchasers and mortgagees can happily go ahead without bothering about performance of this duty. If it is an express trust for sale, in contrast, there will be no duty to consult unless the settlor has thought to impose one.¹² So the crucial question is what, if anything, should be done to protect and preserve a beneficiary's enjoyment of the land from unwanted "overreaching". As Lord Oliver has observed:

His interest is overreached and the purchaser is absolved from inquiry only if the statutory requirements respecting the payment of capital money arising under a disposition upon trust for sale are complied with: sections 2(1)(ii) and 27. Until that occurs, he remains entitled to assert against the trustees and, indeed, against any purchaser from the trustees who has not complied with the statutory requirements all the incidents of his beneficial interest in the proceeds of sale of the property and in the net rents and profits until the sale. One of the incidents of that beneficial interest is, or may be according to the agreement between the beneficiaries or to the purpose for which the trust was originally created, the enjoyment of the property in specie either alone or concurrently with other beneficiaries.¹³

12. Ibid.; as to consents to sale etc. see L.P.A. 1925, s. 26(1).

13. City of London Building Society v. Flegg [1987] 2 W.L.R. 1266 at p. 1279.

In co-ownership cases there will, by law, be a trust for sale even though occupation was the reason for buying the land. Should this occupation, especially if it is actual residence, be defeasible simply by the utilisation of appropriately different documentation?

3.3 Lastly, mention must be made, with some emphasis, of the little appreciated fact that the ordinary "overreaching" machinery cannot be readily operated if there is only one beneficiary solely entitled.¹⁴ The primary statutory provisions cover strict settlements and trusts for sale, not bare or nominee trusts. To no avail, therefore, to appoint a second trustee: no overreaching can occur unless, presumably, both trustees have been approved or appointed by the court or there is a trust corporation acting. Here, the point of view shifts and our enquiry becomes whether or not to extend the ordinary overreaching machinery so as to cover all trusts of land.¹⁵ For without such extension purchasers and mortgagees may think

-
14. As in Hodgson v. Marks [1971] Ch. 892 C.A.; cp. the position where there was once a trust for sale which may be kept alive artificially for the protection of purchasers but not otherwise: L.P.A. 1925, s. 23; Re Cook [1948] Ch. 212.
15. In fact, we have already made this enquiry in Trusts of Land (1985), Working Paper No. 94, para. 16.15:

We suggested earlier that bare trusts of land are a potential source of difficulty in that they do not come within either of the existing statutory systems for trusts of land. We would not suggest any major changes to the existing law. As the bare trustee acts at the direction of the beneficiary, it would be wrong to impose any additional duties on him. However, where sale of the land is concerned difficulties may arise. Generally the purchaser will obtain a good title free from equitable interest, because the trustee conveys in accordance with the wishes of the beneficiary. However, if the trustee conveys without the knowledge of the beneficiary he may appear to be the sole beneficial

themselves at risk so that they ought to make enquiries about equitable entitlement in all cases, which might conceivably cause unacceptably expensive complications in day to day conveyancing.

15. Continued

owner. In such a case the purchaser, where title is unregistered, will only take free if he purchases for value in good faith and has no notice of the equitable interest. Where title is registered, the purchaser will take free unless the beneficiary has protected his minor interest on the register, or is in actual occupation. It seems to be an underlying principle of the Law of Property Act 1925 that land held on trust should be capable of being conveyed free from beneficial interests whether or not the purchaser has notice of them. This is the reason for the overreaching machinery provided in s. 2. We would suggest that bare trusts should be brought within s. 2 so that the interests of the beneficiary can be overreached, provided that at least one additional trustee is appointed.

4. Flegg's case

4.1 It had been thought that this area of the law was well settled and gave rise to few problems. However the case of City of London Building Society v. Flegg,¹ which is discussed below, has focussed attention on two aspects:

- (i) the law was not as well settled as had been thought, since the question of overreaching the interests of beneficiaries in occupation of the land had to go to the House of Lords for decision;
- (ii) the rule that payment must be to two trustees demonstrably provided no protection for the beneficiaries.

4.2 Mr. and Mrs. Flegg were the parents of Mrs. Maxwell-Brown who with her husband suggested that all four should buy a house. The Fleggs sold their bungalow and contributed £18,000 of the purchase price of £34,000. The balance was provided by means of a mortgage by the Maxwell-Browns alone. Because the Fleggs did not wish to be liable under the mortgage, the conveyance was taken in the names of the Maxwell-Browns with an express declaration that the house was held on trust for sale for the Maxwell-Browns as beneficial joint tenants, and that the trustees were to have all the powers of mortgaging the property of an absolute owner. The Maxwell-Browns were duly registered as first proprietors.

¹. [1987] 2 W.L.R. 1266.

4.3 The Fleggs thereafter lived in the house. Without their knowledge, the Maxwell-Browns who had also occupied the house for some years² created a second and third charge, and in January 1982 finally charged the property to the City of London Building Society for £37,500 to repay these earlier charges. The Society made no enquiry of the occupying Fleggs. It was found as a fact that the Fleggs would not have agreed, if consulted, to this mortgage and could not be taken to have authorised the Maxwell-Browns to charge the house. The Fleggs eventually suspected that something was up and on 7 December 1981 applied for the entry of a caution. However, the Society had obtained an official certificate of search giving priority until 14 January 1982. Subsequently, the Maxwell-Browns defaulted on the payments and were adjudicated bankrupt some time in 1982. The writ originally named the Fleggs, the Maxwell-Browns and the Society's solicitor as defendants. As against the parents, the Society sought a declaration that their charge was binding upon them and the removal of the caution. As against the parents and the registered proprietors, the Society sought an order for sale and possession of the premises.

4.4 At first instance, Judge Thomas (sitting as deputy judge of the Chancery Division) held that the beneficial interest of the Fleggs, which had arisen by reason of their initial contributions, had been overreached so that the Society was not bound. Accordingly, Judge Thomas made an order for possession against both them and the Maxwell-Browns.

2. It is not entirely clear when the Maxwell-Browns actually ceased to occupy the property.

4.5 On appeal, the Court of Appeal in a single judgment delivered by Dillion L.J. held that the Society was bound by the Fleggs' interest.³ Two types of argument are discernible:

(a) The general argument

The Fleggs' beneficial interest had not been overreached. The overreaching provisions of the 1925 legislation,⁴ which apply equally to registered and unregistered land, could not operate so as adversely to affect occupying beneficiaries except with their consent. This was by reason of section 14 of the Law of Property Act 1925, which provides that:

This Part of this Act [viz. Part I, sections 1-39] shall not prejudicially affect the interest of any person in possession or in actual occupation of land to which he may be entitled in right of such possession or occupation.

Thirty odd years earlier, Lord Denning had relied upon this in Bull v. Bull⁵ to enable a beneficiary to assert rights of occupation against a trustee before a sale. Thereafter, any sale would be most unlikely, because the trustee would have trouble in giving vacant possession. Dillion L.J. treated section 14 as reflecting a more general principle that a

3. [1986] Ch. 605 C.A. The Maxwell-Browns did not appear and were not represented in the C.A. and H.L. proceedings.

4. Ss. 2(1)(ii), 26(3) and 27(1) of the L.P.A. 1925.

5. [1955] 1 Q.B. 234 C.A.

purchaser will have constructive notice of and be bound by the rights of occupiers of land. Part I of the Act to which section 14 refers includes the overreaching provisions, so that section 14 protected the occupying beneficiaries from being overreached.

(b) The registered land argument

Rights of actual occupiers under a trust for sale have been promoted from mere minor interests, liable to be defeated if not protected on the register, to overriding interests.⁶ Accordingly, the Fleggs' interest would have bound the Society by analogy to the earlier decision in Boland⁷ if there had been a sole registered proprietor of the house at the date of the Society's charge. Dillion L.J. regarded the decision in Boland as not having turned on this last qualification but on the distinction between a minor interest and an overriding interest.

4.6 The decision of the Court of Appeal was unanimously reversed by the House of Lords.⁸ Lord Oliver of Aylmerton gave the fullest judgement. With regard to (a), the general law argument, rights of occupation may arise in favour of the beneficiaries as against the trustees for sale but if the mortgagee complies with the overreaching requirements, the beneficiaries' interest continues only as against the equity of redemption vested in the trustees and the money advanced, so that the foundation of the beneficiaries' occupation disappears. Section 14 cannot thereafter protect

6. L.R.A. 1925, s. 70(1)(g).

7. [1981] A.C. 487 H.L.

8. [1987] 2 W.L.R. 1266 H.L.

the beneficiaries who no longer have any "interest ... to which he may be entitled in right of such ... occupation".

Further, by section 17 of the Trustee Act 1925, "No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof". Thus the fact that the mortgage was an improper transaction entered into by the trustees could not concern the Society.⁹

As for (b), the registered land argument, if the beneficiaries' rights have shifted to the equity of redemption and the money by reason of the compliance with the statutory requirements for overreaching, the beneficiaries in occupation enjoy no rights subsisting in reference to land for the purposes of section 70(1)(g) of the Land Registration Act 1925. There is no inconsistency with Boland which had proceeded from the common ground that by reason of the sole trustee there had been no overreaching.¹⁰ The order for possession made at first instance was restored.

9. Cf. P.H. Kenny, "Will conveyancers warm to Flegg?", (1987) L.S.G. 1952 at p. 1954, contra. Kenny's argument is persuasively rebutted by W.J. Swadling, (1987) L.S.G. 2327.

10. Compare C. Harpum, "The stranger as constructive trustee", (1986) 102 L.Q.R. 67 at p. 272 n. 22: "In the Boland case, a trustee for sale executed a mortgage of the trust property to raise money for his business. This was outside his powers (see Settled Land Act 1925, s. 71(1)) and therefore, even if the advance had been paid to two trustees rather than just to one, it could not have overreached the beneficial interest of the trustee's wife..." This view is clearly untenable post Flegg; it was barely tenable pre Flegg in the light of T.A. 1925, s. 17.

5. Overreaching and overriding since Boland

5.1 In the Commission's report¹ on the implications of Boland the Commission had recommended a registration requirement for equitable co-ownership interests together with a consent requirement and a scheme for co-ownership of the matrimonial home.² That report did advert to certain arguments in the literature³ that doubted whether an overriding interest could ever be overreached in the light of Boland although the report took the orthodox view that a disposition by two trustees probably would overreach the beneficial interests.⁴ Indeed in the pre-Boland Third Report on Family Property,⁵ it had been recommended in this context that where the proposed statutory co-ownership was to apply to a house previously in the husband's sole name, the husband should not be able to appoint an additional trustee unless the wife agreed also,⁶ but an appointment of a trustee that did not comply with the consent requirement would nonetheless be valid as against purchasers where the consent requirement was not apparent from an examination of the title.⁷

1. (1982) Law. Com. No. 115.

2. Ibid., para. 83.

3. E.g. C. Sydenham, "Overreaching and the ratio of Boland's case", [1980] Conv 427.

4. (1982) Law Com. No. 115, para. 15.

5. (1978) Law Com. No. 86.

6. Ibid., para. 1.296.

7. Ibid., para. 1.302.

5.2 It being considered impracticable to adopt the proposal of co-ownership made in the report on Boland, the Land Registration and Law of Property Bill was introduced in 1985 to deal with what was seen as the Boland problem. Applicable to dwelling houses alone, the Bill was to preserve only the protection enjoyed by spouses in occupation who had beneficial interests arising under a trust for sale. For other beneficial co-owners the benefit of "overriding interest" status was to be removed. The same effect was to be achieved for unregistered land by modifying the doctrine of notice by occupation. The Bill was expressly confined to transactions by a sole registered proprietor. It was presumably accepted implicitly that in other cases where the trustees were acting beyond their powers⁸ section 17 of the Trustee Act 1925 would protect the purchaser or mortgagee. More significantly, it was expressly acknowledged by the then Lord Chancellor that if there were more than one person registered as proprietor or on the title deeds as estate owners, a purchaser or mortgagee had "no need to interest himself in the existence of any equitable owner. That is one of the mysteries of our land law".⁹ The Bill was subsequently withdrawn when parts of it proved controversial.

5.3 Consultation by the Commission in the work that led to the Third Report on Land Registration ("Third Report")¹⁰ confirmed that overriding interests should remain as a feature of registered conveyancing. In particular, it was clear that practitioners had come to terms with Boland.

8. Arguably the mortgage in Boland was improper, two trustees or not: see S.L.A. 1925, s. 71.

9. Hansard (H.L.), 5 March 1985, vol. 460, col. 1265.

10. (1987) Law Com. No. 158.

Those consulted also indicated agreement with a preliminary proposal that the indemnity provisions in the Land Registration Act should become available in respect of overriding interests. In the Third Report the Commission proposed that the indemnity scheme should be extended, but to a redefined group of overriding interests that gave fuller expression to two principles, the second to have precedence over the first:

(1) in the interests of certainty and of simplifying conveyancing, the class of right which may bind a purchaser otherwise than as the result of an entry in the register should be as narrow as possible but (2) interests should be overriding where protection against purchasers is needed, yet it is either not reasonable to expect or not sensible to require any entry on the register.¹¹

With regard to protecting the rights of actual occupiers, the Commission took the view that, in the light of the stated principles, these rights should be overriding interests exactly because "it is not reasonable to expect or sensible to require their protection by registration."¹² The Commission agreed that the "rights" of the occupier referred to in section 70(1)(g) should be limited to proprietary as opposed to merely personal rights:

This approach, properly it seems to us, leaves for decision in accordance with general principles of land law the question of whether or not various

11. Ibid., at para. 2.6.

12. Ibid., at para. 2.67.

particular rights are purely personal or are proprietary and within the paragraph... The paragraph is not at present supposed to enlarge the rights of the occupier and there is no suggestion that it should... On consultation and generally this established approach was accepted...¹³

Any restriction on the type of protected proprietary rights, e.g. by restricting them to those rights by virtue of which the occupier was actually in occupation, was rejected not merely as being unduly complicated but also as in potential conflict with the view taken that enquiries do have to be made of occupiers who may have rights:

Upsetting and expensive though this initially seemed to conveyancers in the wake of the Boland decision, as was emphasised by that case, the judicially developed recognition of spouses' equitable rights of ownership in matrimonial homes is nowadays very well known and necessarily implies an obligation that society generally (which includes purchasers and mortgagees) should recognise and respect those rights. In our view, it is undeniably desirable that spouses with such rights should be consulted and involved in all important decisions and transactions affecting their homes. The pure conveyancing necessity for prospective purchasers and mortgagees to make enquiries of occupiers incidentally achieves this desirable consultation and involvement and, as was observed some four years ago, conveyancers have learnt to live with it. However, we do not look to this as

13. Ibid., at para. 2.56.

a sufficient justification for affording a general protection to occupiers' rights; the paragraph is not restricted to the co-ownership rights of spouses in matrimonial homes and there are now no proposals that it should be. It is not self-evident that other persons with such rights, as well as anyone with other rights, should not be similarly consulted and involved, whatever the property. But this should, we consider, be achieved, if at all, by direct substantive provisions in other legislation rather than indirectly by amendments of what were intended to be mere machinery provisions governing registered conveyancing.¹⁴

Indeed, it became apparent on consultation that such protection for purchasers as was afforded by the proviso to section 70(1)(g), i.e. where "enquiry is made of such person and the rights are not disclosed" (without any restriction to such enquiry as is reasonable), was in practice worthless:

Solicitors acting for purchasers and lenders essentially place reliance on the word of vendors and borrowers, seeking waivers or consents from any revealed occupiers of full age. In other words, a risk is undertaken, no enquiries are made on the spot and reliance is placed upon conveyancing being conducted on a basis of good faith. Consistently with this, during consultations, we considered the point that, even without express provision, an occupier would undoubtedly be unable to enforce his

14. Ibid., at para. 2.63.

rights against a purchaser or mortgagee in any case of fraud or estoppel, and this appears correct. We further considered that this must surely be the position too for all other overriding interests: tenants or squatters like tenants in common, could not conceivably be permitted to escape the consequences of fraud or estoppel. Accordingly, the view was taken that the proviso to the present paragraph performs no useful function.¹⁵

5.4 The actual facts of Flegg illustrate that overreaching may be as much an issue in cases where the property is conveyed at the outset to two joint tenants at law (as is increasingly the practice) as it is where there is only one trustee and another is appointed to facilitate overreaching. It is not a case where a second trustee was deliberately appointed by a sole trustee in order to defraud and/or defeat occupation by a beneficiary. The real question is whether some more general limitation on overreaching is necessary to promote the continued protection of occupiers advocated in the Third Report, and whether such limitation ought to be extended to unregistered land. True, the Third Report did not consider itself "constrained by the fact that we might be creating or perpetuating distinctions from unregistered land. Registered conveyancing is after all to be the way forward, the new improving on the old."¹⁶ But Lord Oliver pointed out that if Flegg had been concerned with unregistered land, the Society's charge would still take effect in priority to the parents' interest.

15. Ibid., at para. 2.59.

16. Ibid., at para. 2.5.

6. Options

6.1 In considering the various options, it is necessary to remember that we are not in this exercise primarily concerned with protecting beneficiaries' financial interests.¹ It is their prospect of enjoyment of the land itself and its loss where overreaching occurs upon which we wish to focus. Also bear in mind that it is by no means always plain when and which beneficiaries have a right to occupation as against the trustees and other beneficiaries.² Further, note that the settlor himself may at present effectively restrict "overreaching" with a trust for sale by making the consent of specified beneficiaries a pre-requisite.³ This is not so easy with strict settlements where the powers of disposition of the tenant for life (himself otherwise entitled to occupation) must not be restricted.⁴ Generally, however, let us not forget that it is cases of co-ownership occurring because of duplicate (or multiple) contributions to the acquisition of land (often a dwelling house) and creating a trust for sale without benefit of legal advice or proper conveyancing documentation which are most likely to raise the issues in future.

1. See para. 3.1.

2. This aspect forms part of the larger Trusts of Land exercise: see (1985) Working Paper No. 94, paras. 8.7 et seq.

3. L.P.A. 1925, ss. 26(1) and 205(1)(xxix) - the consent of two suffices for purchasers and may be supplied by the court under L.P.A. 1925, s. 30 and T.A. 1925, s. 57: Re Beale's Settlement Trusts [1932] 2 Ch. 15.

4. S.L.A. 1925, s. 106.

6.2 In addition, it must be remembered that overreaching does not only concern beneficiaries. Although recognising from one point of view the potential objections to comparatively easy overreaching, it is important not to lose sight of the advantages for the public in facilitating reasonably speedy and safe conveyancing. Any option which calls for the involvement of beneficiaries in sales, mortgages or other dispositions of the land goes against the 1925 policy of simplifying conveyancing by, in effect, curtaining the equities off the title.⁵ It may be thought that in practice this should make no appreciable difference in terms of time and cost because no more investigations and enquiries, of occupiers or anyone else, will need to be made than at present.⁶ Purchasers and mortgagees will remain at risk from a wide variety of non-overreachable (and non-registrable) rights and interests. Nevertheless, even if no extra enquiries will have to be made beyond those demanded in any case by the safest conveyancing practice, there is still the telling point to note that any option undermining overreaching will inevitably extend the range of risks taken in conveyancing. Whenever overreaching does not occur, for whatever reason, the beneficiaries' interests will not be detached from the land and attached to the money. So purchasers and mortgagees will be liable to find the land in their hands still bound by such interests - an expensive inconvenience.⁷ It is possible to take free of

5. See Lord Templeman's explanation at para. 2.1 above.

6. See para. 5.3 above.

7. See Ahmed v. Kendrick, The Times, 12 November 1987 C.A. where an innocent purchaser properly paid the price in return for a transfer purportedly signed by two joint vendors, but the signature of one was a forgery: he only acquired a half share in the property. Such a purchaser may not even be entitled to occupation or re-sale: cp. Chhokar v. Chhokar [1984] F.L.R. 313 where the purchaser was not in fact innocent.

unoverreached interests: for example, a bona fide purchaser for value of a legal estate in unregistered land without notice should do so.⁸ But with any beneficiaries in occupation, he is unlikely to be so lucky.⁹ Remedies in contract and/or tort may very well then be as available as they are worthless.¹⁰ Just as actions by evicted beneficiaries for breach of trust are not much good against vanished or bankrupt trustees.

Proposal I: cautions and land charges

6.3 At present any beneficiary wishing to be consulted and involved in a subsequent purchase or mortgage of registered land can achieve this by means of a caution on the register.¹¹ In this way, had the Fleggs entered their caution earlier than they did, the Society's attention would have been drawn to their beneficial interests, and the Society would have been unlikely to have taken the charge without further enquiries. But had the Society thrown caution to the wind (so to speak) and proceeded to advance the moneys to the Maxwell-Browns, then the parents' interests would still have been overreached. Proposal I is that a purchaser or mortgagee would take free from the interests of beneficiaries (whether or not in occupation) who had entered a caution (or other appropriate entry) only where the transaction had the consent of those

8. Beneficiaries would then have an interest in the proceeds of sale by virtue of the equitable doctrine of tracing: cp. Lake v. Bayliss [1974] 1 W.L.R. 1073.

9. Cp. para. 6.7.

10. It is understood that certain of the financial institutions most at risk treat overriding interests of the Boland type as economically insurable risks.

11. Elias v. Mitchell [1972] Ch. 652.

beneficiaries. If the beneficial interests were not protected by entry on the register, they would be overreached provided the money was paid to two trustees (or a trust corporation). Where title to land is unregistered, it would be necessary to make provision for the registration of such interests as a new land charge, since the Land Charges Act 1972 does not provide for registration of interests behind trusts.

6.4 On its own this proposal can be rejected as being both complex and unrealistic. It will not afford sufficient protection for those beneficiaries, i.e. occupiers, most in need. Interests under trusts for sale in particular are very often found to arise informally and without any understanding of the strict legal and equitable position on the part of the beneficiaries liable to be defeated. Accordingly this present proposal is inconsistent with the view taken in the Third Report that with occupiers it is not always reasonable to expect or sensible to require protection by registration.¹² For example, under this proposal the Fleggs would actually have been no better off, given the date of their eventual entry of a caution, and it is likely that registration would not take place until too late. Also, the entry of a caution requiring consent for overreaching would not confine the protection to beneficiaries interested in enjoying occupation of the land.

Proposal II: no overreaching without consent of occupying beneficiaries

6.5 In contrast to the very limited effect of the first proposal, it could be suggested that no overreaching should

12. See para. 2.6.

be possible without every beneficiary's consent. It may be argued that the duty to consult¹³ is far too limited¹⁴ and that the only way to protect beneficiaries adequately is to involve them directly in every sale or mortgage. However, this wide proposal would be impracticable. The purchaser/mortgagee could have no acceptable means of ascertaining who all the beneficiaries are, and they might not be of full age.

6.6 However, requiring consent of those beneficiaries in occupation may well strike the right balance between beneficiaries and purchasers. Accordingly this Proposal actually is that the interest of an occupying beneficiary should only be capable of being overreached with his or her consent, irrespective of whether the beneficiary has sought to protect himself by an entry on the register. The proposal is consistent with the approach to the rights of occupiers seen in Boland and achieves the effect of the Court of Appeal decision in Flegg. In cases of a sole registered proprietor or sole estate owner it appears inconsistent to protect beneficiaries in actual occupation only until a second trustee is appointed. Further if interests in actual occupation are worth protecting, they ought to be protected whether or not the property was originally conveyed to or subsequently vested in joint owners at law. As recognised in the debates on the Land Registration and Law of Property Bill and upon consultation preceding the Third Report, conveyancers have come to terms with Boland and anticipate the existence of beneficial interests belonging to occupiers and not represented on the legal title. If it is reasonable to expect some sort of

13. See L.P.A. 1925, s. 26(3).

14. See Trusts of Land (1985), Working Paper No. 94, paras. 3.12, 8.6.

examination of actual occupation in the case of a sole registered proprietor, the same ought to be true of all dispositions. In any case, this examination ought always to be carried out, even if there are two registered proprietors, because of the possibility of there being occupiers with rights which cannot be overreached.¹⁵ Further, the practice of obtaining consents of or waivers by discovered occupiers (at least those of full age) is well suited to the proposal. This practice in the case of a sole registered proprietor may be dangerous, in that the mere obtaining of a consent is no substitute (unless by way of estoppel) for compliance with the overreaching machinery which requires payment to two trustees. However, this proposal means that the overreaching machinery itself will work only if such consents are obtained. If the proposal is adopted without any change in substantive law, then the purchaser or mortgagee of registered or unregistered land will take subject to the interests of a beneficiary in actual occupation if his consent is not obtained, and what will continue to be crucial will be the actuality of his occupation and not the appearance. If the beneficiary wishes to rely on protection by registration rather than the uncertainty of actual occupation, with registered land a restriction could be registered to the effect that no registered disposition can take place without his consent. This does not require a change in the law. With unregistered land, however, protection by registration as a land charge would require a change in the law.

6.7 It should be appreciated that where the "overreaching" machinery does not for any reason operate,

15. As to the timing and agency of the examination, see e.g. Kingsnorth Finance Co. Ltd. v. Tizard [1986] 1 W.L.R. 783.

the purchaser or mortgagee of land held on trust for sale¹⁶ will as a rule take subject to the interest of a beneficiary (i) with registered land if the interest is either protected on the register or else "overriding", i.e. because the beneficiary is in actual occupation "save where enquiry is made of such person and the rights are not disclosed";¹⁷ (ii) with unregistered land if he had notice of the beneficiary's interest, i.e. usually because the beneficiary was in actual occupation and the rights "would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him".¹⁸ The significant difference (apart from the possibility of protection on the register) is that with registered land the (negative) results of reasonable enquiries are irrelevant. In practice the outcome appears most likely to be the same with each system.¹⁹

6.8 As a matter of good conveyancing practice, it is to be expected that any necessary consents would be obtained before completion and would take the form of signed writing. None of this, however, need be made essential. There is already sufficiently analagous authority for the proposition that a beneficiary's consent to a transaction may be inferred from conduct and may be effective retrospectively.²⁰ So a beneficiary who leaves voluntarily

16. With settled land the conveyance itself will be ineffective: S.L.A. 1925, s. 18(1)(b),(c).

17. L.R.A. 1925, s. 70(1)(g).

18. L.P.A. 1925, ss. 14 and 199(1)(ii)(a).

19. As in Boland and Flegg.

20. See Ahmed v. Kendrick, The Times, 12 November 1987 C.A. - acquiescence in discharge of mortgage out of proceeds of fraudulent sale; cp. Spiro v. Lintern [1973] 1 W.L.R. 1002 C.A. as to estoppel.

after a sale, despite having been in occupation and not having consented, ought ordinarily to be treated as overreached (assuming an otherwise proper payment to two trustees or a trust corporation). Better again, of course, would be an express written ratification.

6.9 One problem with the proposal is its uncertain effect on the rights of beneficiaries as against trustees for sale. It would mean that in all cases the consent of beneficiaries in occupation will be necessary to any sale or mortgage, although otherwise it would not be. If such a beneficiary in occupation withheld his consent, application to the court could be made under section 30 of the Law of Property Act 1925, but this might not be thought a course to encourage.

6.10 Another problem lies in ensuring the reality of the beneficiary's consent. In many cases, the beneficiary's consent might be obtained under the influence of the trustees proposing the disposition. The purchasing or lending third party will only be affected by the undue influence of such trustees where it can be shown that the trustees were in effect the purchaser's or lender's agent, but in such cases (e.g. where a wife or an aged parent agrees to execute a legal charge under the influence of their husband or child who defaults on the instalments) the purchaser or lender must also point out the desirability of obtaining independent legal advice and, per Oliver L.J. as he then was) in Coldunell Ltd. v. Gallon,²¹ they should require that the documents be executed in the presence of a solicitor. It may thus be the case that prudent purchasers or lenders would require that discovered occupiers whose

21. [1986] Q.B. 1184 C.A.

consent would be necessary should act through a solicitor, which would clearly be expensive. The alternative is that (as the Third Report noted of the response to Boland), conveyancing risks will be taken and reliance placed upon conveyancing being conducted in good faith. If this is acceptable in Boland type cases, then it might be reasonable to expect that purchasers or lenders will either take steps to ensure the reality of the consent of beneficiaries in occupation, or take the risk that nothing will go wrong, ignore the possibility that the rights of occupying beneficiaries are not otherwise overreachable, and look to their insurers if a disgruntled beneficiary complains.

6.11 Yet another patent problem can be anticipated with the possibility that infant (or minor) occupiers could be beneficiaries whose consent might not be irrevocably reliable.²² Of course, the court could consent to the transaction on their behalf²³ but this would do little for the cause of speedier and cheaper conveyancing. Alternatively, it could be provided that the consent of their parent(s) (or guardian) should suffice for overreaching purposes. In practice, this would probably work well in the vast majority of cases but difficulties over identities, not to mention dissents, of parents (or guardians) must inevitably be encountered. Another more robust solution would be to restrict the requisite consents to those of beneficiaries of full age. This would correspond with the realities of practice and has a

22. Cp. the principle of "qualified unenforceability" supported by the Commission in *Minors' Contracts* (1984), Law Com. No. 134; see also paras. 5.11 and 5.12 of that report as to receipts and discharges under trusts. The report has been implemented by the *Minors' Contracts Act* 1987.

23. See *L.P.A.* 1925, s. 30; also *T.A.* 1925, s. 57.

persuasive precedent in the statutory duty of trustees to consult only such beneficiaries.²⁴

6.12 Another possible restriction is to provide that the consent of the beneficiaries in actual occupation will be necessary only where the property comprises their matrimonial home. Under this variation of the proposal, the fear that Boland can be evaded by the husband's (or wife's) appointment of a second trustee would be allayed. In the Flegg situation, the proposal would still protect the Fleggs as they were occupying the house as their matrimonial home; spouses would be protected in the matrimonial home whether or not either spouse was a trustee. In the many other situations where a beneficiary is in actual occupation other than as a spouse, his or her interest would remain overreachable. In addition to the difficulties in obtaining genuine consents, this variation requires the purchaser or mortgagee to ascertain that the house is being occupied as a matrimonial home. It may not be unreasonable to expect purchasers or mortgagees to inspect the property with a view to ascertaining whether it is being occupied as a matrimonial home. What may be unreasonable about the variation is that it is confined to spouses occupying the property as a home whilst Proposal II as initially stated²⁵ would protect anyone occupying any property.²⁶

24. See L.P.A. 1925, s. 26(3); cp. ibid. ss. 19, 20 and 21.

25. Para. 6.6.

26. Thomas, Sarah and Rachel (see para. 1.1) may as well not be spouses but siblings, or parent(s) and child(ren), or even just good friends.

Proposal III: no overreaching unless one trustee is solicitor or licensed conveyancer

6.13 Although the real worry nowadays may be loss of the land itself through overreaching, it remains a real problem in cases such as Boland and Flegg that the beneficiary's interest in the proceeds of sale is rendered valueless upon the bankruptcy of the recipients of the moneys advanced. The provision in the Property Acts of 1925 that required payment to two trustees was, as Sir Benjamin Cherry saw it, protection against fraud. If the policy of ensuring that land held on trust is freely available on the market, supports overreaching, a compromise would be to increase the security to the overreached beneficiary of his claim to the proceeds. If a solicitor (or licensed conveyancer) trustee is fraudulent or negligent, no doubt reimbursement can be sought via the indemnity and insurance arrangements insisted upon by the profession's governing body. But there is more to this proposal than that: presumably solicitors (or licensed conveyancers) acting as trustees can be relied upon to do so properly in most if not all cases. In particular, they may reasonably be expected to observe the duty, moral when not legal, actually to consult any beneficiaries, such as those in occupation, before undertaking any transaction which may affect them. They may also appropriately give effect to their wishes. Purchasers and mortgagees should be happy because they need only know that they are paying a solicitor (or licensed conveyancer) as one of two trustees.²⁷ The obvious objection to all this must be that it would thrust solicitors (or licensed conveyancers) upon people who do not want them, not to mention the extra expense. True, the involvement of solicitors, preferably as advisers but at least as witnesses, has recently had no

²⁷. Cp. L.P.A. 1925, s. 26(3) as to this sort of unconcern.

little judicial support.²⁸ But we must certainly hesitate long before proposing that the desirable become compulsory, especially since another less obvious objection may be a reluctance on the part of solicitors (or licensed conveyancers) to undertake this extra responsibility on sales and mortgages.²⁹

Proposal IV: do nothing

6.14 The problem with leaving the law as it now stands is that this sits ill with the recognition in the Third Report that wherever possible interests should be overriding where protection against purchasers is needed.³⁰ Overreaching provides an easy escape route for purchasers and mortgagees unless, of course, the trust is bare.³¹ So something surely should be done. True it might be possible to use other means to discourage attempts to overreach. These might include the threat of the criminal law: had not Thomas and Rachel conspired against Sarah and deceived the Bank? Could they conceivably be guilty of stealing the land?³² The trouble with all this is that it may be small

28. See para. 6.10.

29. Another not insignificant objection may be seen in the undeniable fact that solicitors and licensed conveyancers must have private lives as well as professional existences: they may well therefore be co-beneficiaries with spouses or others. Sarah could feel understandably aggrieved if Thomas or even Rachel turned out to be a solicitor (see para. 1.1). Requiring purchasers and mortgagees to check the independence of a solicitor-trustee for overreaching purposes would appear an impracticable complication.

30. (1987) Law Com. No. 158, para. 2.65.

31. See para. 3.3.

32. Read the Theft Act 1968, s. 4:

consolation to Sarah to have relations and/or friends punished by the criminal law. Looking at other means of fixing someone with liability, had not the Bank committed the tort of conspiracy to injure Sarah's interests or were not the Bank seeking to rely on the statutory overreaching machinery as an instrument of fraud? Unlikely, but these sanctions may appear well suited to the situation where a purchaser or mortgagee encourages a sole registered proprietor to appoint a second trustee for the purposes of overreaching the interests of known occupying beneficiaries.

32. Continued

(2) A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that is to say -

- (a) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him; ...

The Criminal Law Revision Committee's draft Bill, cl. 4(2), used the narrower phrase "breach of the trust" (Eighth Report 'Theft and Related Offences' (1966), Cmnd. 2977).

7. Provisional conclusion

7.1 It is our present view that there is a case for reforming the law on "overreaching" for private trusts (i.e. when interests in land become instead interests in money). We are also at the moment of the opinion that, in principle, the law would better balance the practical concerns of purchasers and mortgagees against the special needs of beneficiaries for the land itself if it prevented their interests being "overreached" without their consent where they are in actual occupation and of full age. In other words, we tentatively favour Proposal II. In addition, we would repeat the suggestion that the "overreaching" machinery should be available for the protection of purchasers and mortgagees in respect of interests under bare trusts too.¹

7.2 So Sarah, living in the house, should not be overreached and evicted, even if Thomas did appoint Rachel as a second trustee, unless of course she consented.² However, if she were a sole yet non occupying beneficiary, she could be.

1. See para. 3.3.

2. See para. 1.1.

APPENDIX

CONTENTS

Law of Property Act 1925

- S. 2
- S. 10
- S. 14
- S. 26-7
- S. 42
- S. 205

Settled Land Act 1925

- S. 21
- S. 72
- S. 94-5

Trustee Act 1925

- S. 14

Law of Property (Amendment) Act 1926

- S. 3

LAW OF PROPERTY ACT 1925

2.—(1) A conveyance to a purchaser of a legal estate in land shall overreach any equitable interests or power affecting that estate, whether or not he has notice thereof, if—

Conveyances overreaching certain equitable interests and powers.

15 Geo. 5.
c.18.

- (i) the conveyance is made under the powers conferred by the Settled Land Act 1925 or any additional powers conferred by a settlement, and the equitable interest or power is capable of being overreached thereby, and the statutory requirements respecting the payment of capital money arising under the settlement are complied with;
- (ii) the conveyance is made by trustees for sale and the equitable interest or power is at the date of the conveyance capable of being overreached by such trustees under the provision of subsection (2) of this section or independently of that subsection, and the statutory requirements respecting the payment of capital money arising under a disposition upon trust for sale are complied with;
- (iii) the conveyance is made by a mortgagee or personal representative in the exercise of his paramount powers, and the equitable interest or power is capable of being overreached by such conveyance, and any capital money arising from the transaction is paid to the mortgagee or personal representative;
- (iv) the conveyance is made under an order of the court and the equitable interest or power is bound by such order, and any capital money arising from the transactions is paid into, or in accordance with the order of, the court.

(2) [Where the legal estate affected is subject to a trust for sale, then if at the date of a conveyance made after the commencement of this Act under the trust for sale or the powers conferred on the trustees for sale, the trustees (whether original or substituted) are either]—

- (a) two or more individuals approved or appointed by the court or the successors in office of the individuals so approved or appointed; or

- (b) a trust corporation,

[any equitable interest or power having priority to the trust for sale] shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land until sale.

(3) The following equitable interests and powers are excepted from the operation of subsection (2) of this section, namely—

- (i) Any equitable interest protected by a deposit

- of documents relating to the legal estate attested;
- (ii) The benefit of any covenant or agreement restrictive of the user of land;
 - (iii) Any easement, liberty, or privilege over or affecting land and being merely an equitable interest (in this Act referred to as an "equitable easement");
 - (iv) The benefit of any contract (in this Act referred to as an "estate contract") to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption, or any other like right;
 - (v) Any equitable interest protected by registration under the Land Charges Act 1925 other than-
 - (a) an annuity within the meaning of Part II of that Act;
 - (b) a limited owner's charge or a general equitable charge within the meaning of that Act.

(4) Subject to the protection afforded by this section to the purchaser of a legal estate, nothing contained in this section shall deprive a person entitled to an equitable charge of any of his rights or remedies for enforcing the same.

(5) So far as regards the following interests, created before the commencement of this Act (which accordingly are not within the provisions of the Land Charges Act 1925), namely-

- (a) the benefit of any covenant or agreement restrictive of the user of the land;
- (b) any equitable easement;
- (c) the interest under a puisne mortgage within the meaning of the Land Charges Act 1925 unless and until acquired under a transfer made after the commencement of this Act;
- (d) the benefit of an estate contract unless and until the same is acquired under a conveyance made after the commencement of this Act;

a purchaser of a legal estate shall only take subject thereto if he has notice thereof, and the same are not overreached under the provisions contained or in the manner referred to in this section.

Notes

Subs. (2): substitutions made by the Law of Property (Amendment) Act 1926, s.7, Sched.

10.-(1) Where title is shown to a legal estate in land, it shall be deemed not necessary or proper to include in the abstract of title an instrument relating only to interests or powers which will be overreached by the conveyance of the estate to which title is being shown; but nothing in this Part of this Act affects the liability of any person to disclose an equitable interest or power which will not be so overreached, or to furnish an abstract of any instrument creating or affecting the same.

Title to be shown to legal estates.

(2) A solicitor delivering an abstract framed in accordance with this Part of this Act shall not incur any liability on account of an omission to include therein an instrument which, under this section, is to be deemed not necessary or proper to be included, nor shall any liability be implied by reason of the inclusion of any such instrument.

Interests of
persons in
possession.

14. This part of this Act shall not prejudicially affect the interest of any person in possession or in actual occupation of land to which he may be entitled in right of such possession or occupation.

26.—(1) If the consent of more than two persons is by the disposition made requisite to the execution of a trust for sale of land, then, in favour of a purchaser, the consent of any two of such person to the execution of the trust or to the exercise of any statutory or other powers vested in the trustees for sale shall be deemed sufficient.

Consents to the execution of a trust for sale.

(2) Where the person whose consent to the execution of any such trust or power is expressed to be required in a disposition is not *sui juris* or becomes subject to disability, his consent shall not, in favour of a purchaser, be deemed to be requisite to the execution of the trust or the exercise of the power; but the trustees shall, in any such case, obtain the separate consent of the parent or testamentary or other guardian of an infant or of the ... receiver (if any) of a [person suffering from mental disorder].

(3) Trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this subsection have been complied with.

In the case of a trust for sale, not being a trust for sale created by or in pursuance of the powers conferred by this or any other Act, this subsection shall not apply unless the contrary intention appears in the disposition creating the trust.]

(4) This section applies whether the trust for sale is created before or after the commencement or by virtue of this Act.

Notes

Subs.(2): amended by the Mental Health Act 1959, s.149(1) Sched. 7. Part I.

Subs.(3): substituted by the Law of Property (Amendment) Act 1926, s.7, Sched.

27.—(1) A purchaser of a legal estate from trustees for sale shall not be concerned with the trusts affecting the proceeds of sale of land subject to a trust for sale (whether made to attach to such proceeds by virtue of this Act or otherwise), or affecting the rents and profits of the land until sale, whether or not those trusts are declared by the same instrument by which the trust for sale is created.

Purchaser not to be concerned with the trusts of the proceeds of sale which are to be paid to two or more trustees or to a trust corporation.

(2) Notwithstanding anything to the contrary in the instrument (if any) creating a trust for sale of land or in the settlement of the net proceeds, the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as trustees for sale,

except where the trustee is a trust corporation, but this subsection does not affect the right of a sole personal representative as such to give valid receipts for, or direct the application of, proceeds of sale or other capital money, nor, except where capital money arises on the transaction, render it necessary to have more than one trustee.]

Notes

Subs.(2): substituted by the Law of Property (Amendment) Act 1926, s.7, Sched.

42.—(1) A stipulation that a purchaser of a legal estate in land shall accept a title made with the concurrence of any person entitled to an equitable interest shall be void, if a title can be made discharged from the equitable interest without such concurrence—

Provisions as to contracts.

- (a) under a trust for sale; or
- (b) under this Act, or the Settled Land Act 1925, or any other statute.

(2) A stipulation that a purchaser of a legal estate in land shall pay or contribute towards the costs of or incidental to—

- (a) obtaining a vesting order, or the appointment of trustees of a settlement, or the appointment of trustees of a conveyance on trust for sale; or
- (b) the preparation stamping or execution of a conveyance on trust for sale, or of a vesting instrument for bringing into force the provisions of the Settled Land Act 1925;

shall be void.

(3) A stipulation contained in any contract for the sale or exchange of land made after the commencement of this Act, to the effect that an outstanding legal estate is to be traced or got in by or at the expense of a purchaser or that no objection is to be taken on account of an outstanding legal estate, shall be void.

(4) If the subject matter of any contract for the sale or exchange of land—

- (i) is a mortgage term and the vendor has power to convey the fee simple in the land, or, in the case of a mortgage of a term or years absolute, the leasehold reversion affected by the mortgage, the contract shall be deemed to extend to the fee simple in the land or such leasehold reversion;
- (ii) is an equitable interest capable of subsisting as a legal estate, and the vendor has power to vest such legal estate in himself or in the purchaser or to require the same to be so vested, the contract shall be deemed to extend to such legal estate;
- (iii) is an entailed interest in possession and the vendor has power to vest in himself or in the purchaser the fee simple in the land, (or, if the entailed interest is an interest in an interest in a (term of years absolute, such term) or to require the same to be so vested, the contract shall be deemed to extend to the fee simple in the land or the term of years absolute.

(5) This section does not affect the right of a mortgagee of leasehold land to sell his mortgage term only if he is unable to convey or vest the leasehold reversion expectant thereon.

(6) Any contract to convey an undivided share in land made before or after the commencement of this Act, shall be deemed to be sufficiently complied with by the conveyance of a corresponding share in the proceeds of sale of the land in like manner as if the contract had been to convey that corresponding share.

(7) Where a purchaser has power to acquire land compulsorily, and a contract, whether by virtue of a notice to treat or otherwise, is subsisting under which title can be made without payment of the compensation money into court, title shall be made in that way unless the purchaser, to avoid expense or delay or for any special reason, considers it expedient that the money should be paid into court.

(8) A vendor shall not have any power to rescind a contract by reason only of the enforcement of any right under this section.

(9) This section only applies in favour of a purchaser for money or money's worth.

205.—(1) In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

General definitions.

- (i) "Bankruptcy" includes liquidation by arrangement; also in relation to a corporation means the winding up thereof;
- (ii) "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; "convey" has a corresponding meaning; and "disposition" includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and "dispose of" has a corresponding meaning;
- (iii) "Building purposes" include the erecting and improving of, and the adding to, and the repairing of buildings; and a "building lease" is a lease for building purposes or purposes connected therewith;
- (iv) "Death duty" means estate duty, ... and every other duty leviable or payable on a death;
- (v) "Estate owner" means the owner or a legal estate, but an infant is not capable of being an estate owner;
- (vi) "Gazette" means the London Gazette;
- (vii) "Incumbrance" includes legal or equitable mortgage and a trust for securing money, and a lien, and a charge or a portion, annuity, or other capital or annual sum; and "incumberancer" has a meaning corresponding with that of an incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof;
- (viii) "Instrument" does not include a statute, unless the statute creates a settlement;
- (ix) "Land" includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land; but not an undivided share in land; and "mines and minerals" include any strata or seam or minerals or substances in or under any land, and powers of working and getting the same but not an undivided share thereof; and "manor" includes a lordship, and reputed manor or lordship; and "hereditament" means any real property which on an intestacy occurring before the commencement of this Act

might have devolved upon an heir;

- (x) "Legal estates" mean the estates, interests and charges, in or over land (subsisting or created at law) which are by this Act authorised to subsist or to be created as legal estates; "equitable interests" mean all the other interests and charges in or over land or in the proceeds of sale thereof; an equitable interest "capable of subsisting as a legal estate" means such as could validly subsist or be created as a legal estate under this Act;
- (xi) "Legal powers" include the powers vested in a chargee by way of legal mortgage or in an estate owner under which a legal estate can be transferred or created; and "equitable powers" mean all the powers in or over land under which equitable interests or powers only can be transferred or created;
- (xii) "Limitation Acts" means the Real Property Limitation Acts 1833, 1837 and 1874, and "limitation" includes a trust;
- [(xiii) "Mental disorder" has the meaning assigned to it by [section 1 of the Mental Health Act 1983] and "receiver" in relation to a person suffering from mental disorder, means a receiver appointed for that person under [Part VIII of the Mental Health Act 1959 or Part VII of the said Act of 1983].]
- (xiv) A "mining lease" means a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant a licence for mining purposes;
- (xv) "Minister" means [the Minister of Agriculture, Fisheries and Food];
- (xvi) "Mortgage" includes any charge or lien on any property for securing money or money's worth; "legal mortgage" means a mortgage by demise or subdemise or a charge by way of legal mortgage and "legal mortgagee" has a corresponding meaning; "mortgage money" means money or money's worth secured by a mortgage; "mortgagor" includes any person from time to time deriving title under the original mortgagor or entitled to redeem a mortgage according to his estate interest or right in the mortgaged property; "mortgagee" includes a chargee by way of legal mortgage and any person from time to time deriving title under the original mortgagee; and "mortgagee in possession" is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property; and "right of redemption" includes an option to repurchase only if the option in effect creates a right of

redemption;

- (xvii) "Notice" includes constructive notice;
- (xviii) "Personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the court;
- (xix) "Possession" includes receipt of rents and profits or the right to receive the same, if any; and "income" includes rents and profits;
- (xx) "Property" includes any thing in action, and any interest in real or personal property;
- (xxi) "Purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property except that in Part I of this Act and elsewhere where so expressly provided "purchaser" only means a person who acquires an interest in or charge on property for money or money's worth; and in reference to a legal estate includes a charge by way of legal mortgage; and where the context so requires "purchaser" includes an intending purchaser; "purchase" has a meaning corresponding with that of "purchaser"; and "valuable consideration" includes marriage but does not include a nominal consideration in money;
- (xxii) "Registered land" has the same meaning as in the Land Registration Act 1925, and "Land Registrar" means the Chief Land Registrar under that Act;
- (xxiii) "Rent" includes a rent service or a rentcharge, or other rent, toll, duty, royalty, or annual or periodical payment in money or money's worth, reserved of issuing out of or charged upon land, but does not include mortgage interest; "rentcharge" includes a fee farm rent; "fine" includes a premium or foregift and any payment, consideration, or benefit in the nature of a fine, premium or foregift; "lessor" includes an underlessor and a person deriving title under a lessor or underlessor; and "lessee" includes an underlessee and a person deriving title under a lessee or underlessee, and "lease" includes an underlease or other tenancy;
- (xxiv) "Sale" includes an extinguishment of manorial incidents, but in other respects means a sale property so called;
- (xxv) "Securities" include stocks, funds and shares;
- (xxvi) "Tenant for life," "statutory owner," "settled land" "settlement," "vesting deed," "subsidiary," "vesting deed," "vesting order," "vesting instrument,"

"trust instrument," "capital money," and "trustees of the settlement" have the same meanings as in the Settled Land Act 1925;

(xxvii) "Term of years absolute" means a term of years (taking effect either in possession or in reversion whether or not at a rent) with or without impeachment for waste, subject or not to another legal estate, and either certain or liable to determination by notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event (other than the dropping of a life, or the determination of a determinable life interest); but does not include any term of years determinable with life or lives or with the cesser or a determinable life interests, nor, if created after the commencement of this Act, a term of years which is not expressed to take effect in possession within twenty-one years after the creation thereof where required by this Act to take effect within that period; and in this definition the expression "term of years" includes a term for less than a year, or for a year or years and a fraction of a year or from year to year;

(xxviii) "Trust Corporation" means the Public Trustee or a corporation either appointed by the court in any particular case or to be a trustee or entitled by rules made under subsection (3) of section four of the Public Trustee Act 1906 to act as custodian trustee;

6 Edw. 7. c.55

(xxix) "Trust for sale", in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent or any person, and with or without a power at discretion to postpone the sale; "trustees for sale" mean the persons (including a personal representative) holding land on trust for sale; and "power to postpone a sale" means power to postpone in the exercise of a discretion;

(xxx) "United Kingdom" means Great Britain and Northern Ireland;

(xxxi) "Will" includes codicil.

[1A] Any reference in this Act to money being paid into court shall be construed as referring to the money being paid into the Supreme Court or any other court that has jurisdiction, and any reference in this Act to the court, in a context referring to the investment or application of money paid into court, shall be construed, in the case of money paid into the Supreme Court, as referring to the High Court, and in the case of money paid into another court, as referring to that other court.]

(2) Where an equitable interest in or power over property arises by statute or operation of law, references to the creation of an interest or power include references to any interest or power so arising.

(3) References to registration under the Land Charges Act 1925, apply to any registration made under any other statute which is by the Land Charges Act 1925, to have effect as if the registration had been made under that Act.

Notes

Subs.(1): para. (iv) words omitted repealed by the Finance Act 1949, s.52(10), Sched. 11, Part IV; para. (xiii) substituted by the Mental Health Act 1959, s.149(1), Sched. 7, Part I, amended by the Mental Health Act 1983, s.148, Sched. 4, para. 5; para. (xv) amended by the Transfer of Functions (Ministry of Food) Order 1955, S.I. 1955/554.

Subs.(1A): added by the Administration of Justice Act 1965, s.17, Sched. 1.

SETTLED LAND ACT 1925

Absolute owners
subject to
certain
interests to
have the powers
of tenant for
life.

2L-(1) Where a person of full age is beneficially entitled in possession to a legal estate subject to any equitable interests or powers, then, for the purpose of overreaching such interests or powers, he may, notwithstanding any stipulation to the contrary, by deed (which shall have effect as a principal vesting deed within the meaning of this Act) declare that the legal estate is vested in him on trust to give effect to all equitable interests and powers affecting the legal estate, and that deed shall be executed by two or more individuals approved or appointed by the court or a trust corporation, who shall be stated to be the trustee of the settlement for the purposes of this Act.

Thereupon so long as any of the equitable interests and powers are subsisting the following provisions shall have effect:-

(a) The person so entitled as aforesaid and each of his successors in title being an estate owner shall have the powers of a tenant for life and the land shall be deemed to be settled land;

(b) The instrument (if any) under which his estate arises or is acquired, and the instrument (if any) under which the equitable interests or powers are subsisting or capable of taking effect shall be deemed to be the trust instrument:

Provided that where there is no such instrument as last aforesaid then a deed (which shall take effect as a trust instrument) shall be executed contemporaneously with the vesting deed, and shall declare the trusts affecting the land;

(c) The persons stated in the principal vesting deed to be the trustees of the settlement for the purposes of this Act shall also be the trustees of the trust instrument for those purposes; and

(d) Capital money arising on any disposition of the land shall be paid to or by the direction of the trustees of the settlement or into court, and shall be applicable towards discharging or providing for payment in due order of any principal money payable in respect of such interests or charges as are overreached by such disposition, and until so applied shall be invested or applied as capital money under the trust instrument, and the income thereof shall be applied as the income of such capital money, and be liable for keeping down in due order any annual or periodical sum which may be overreached by the disposition.

(2) The following equitable interests and powers are excepted from the operation of subsection (1) of this section, namely-

(i) an equitable interest protected by a deposit of

documents relating to the legal estate affected;

- (ii) the benefit of a covenant or agreement restrictive of the user of land;
- (iii) and easement, liberty or privilege over or affecting land and being merely an equitable interest;
- (iv) the benefit of a contract to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option of purchase, a right of pre-emption, or any other like right;
- (v) any equitable interest protected by registration under the Land Charges Act 1925, other than-
 - (a) an annuity within the meaning of Part II of that Act;
 - (b) a limited owner's charge or a general equitable charge within the meaning of that Act.

(3) Subject to the powers conferred by this Act on a tenant for life, nothing contained in this section shall deprive an equitable chargee of any of his rights or of his remedies for enforcing those rights.

Completion of
transactions by
conveyance.

72.—(1) On a sale, exchange, lease, mortgage, charge, or other disposition, the tenant for life may, as regards land sold, given in exchange, leased, mortgaged, charged, or otherwise disposed of, or intended so to be, or as regards easements or other rights or privileges sold, given in exchange, leased, mortgaged, or otherwise disposed of, or intended so to be, effect the transaction by deed to the extent of the estate or interest vested or declared to be vested in him by the last or only vesting instrument affecting the settled land or any less estate or interest, in the manner requisite for giving effect to the sale, exchange, lease, mortgage, charge, or other disposition, but so that a mortgage shall be effected by the creation of a term of years absolute in the settled land or by charge by way of legal mortgage, and not otherwise.

(2) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, privileges or other interests created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

- (i) all legal estates and charges by way of legal mortgage having priority to the settlement; and
- (ii) all legal estates and charges by way of legal mortgage which have been conveyed or created for securing money actually raised at the date of the deed; and
- (iii) all leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges which—

(a) were before the date of the deed granted or made for value in money or money's worth, or agreed so to be, by the tenant for life or statutory owner, or by any of his predecessors in title, or any trustees for them, under the settlement, or under any statutory power, or are at that date otherwise binding on the successors in title of the tenant for life or statutory owner; and

(b) are at the date of the deed protected by registration under the Land Charges Act 1925, if capable of registration thereunder.

(3) Notwithstanding registration under the Land Charges Act 1925, of—

- (a) an annuity within the meaning of Part II of that Act;
- (b) a limited owner's charge or a general equitable charge within the meaning of that Act;

a disposition under this Act operates to overreach such annuity or charge which shall, according to its priority, take effect as if limited by the settlement.

(4) Where a lease is by this Act authorised to be made by writing under hand only, such writing shall have the same operation under this section as if it had been a deed.

Number of
trustees to
act.

94.—(1) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the trustee is a trust corporation.

(2) Subject as aforesaid the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

Trustees'
receipts.

95.—The receipt or direction in writing of or by the trustees of the settlement, or where a sole trustee is a trust corporation, of or by that trustee, or of or by the personal representatives of the last surviving or continuing trustee, for or relating to any money or securities, paid or transferred to or by the direction of the trustees, trustee, or representatives, as the case may be, effectually discharges the payer or transferor therefrom and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

TRUSTEE ACT 1925

14.—(1) The receipt in writing of a trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring, or delivering the same and shall effectually exonerate him from seeing to the application or being answerable for any loss or misapplication thereof.

Power of
trustees to
give receipts.

(2) This section does not, except where the trustee is a trust corporation enable a sole trustee to give a valid receipt for—

- (a) the proceeds of sale or other capital money arising under a ... trust for sale of land;
- (b) capital money arising under the Settled Land Act 1925.

(3) This section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust.

15 Geo. 5.
c.18.

Notes

Subs.(2): words omitted repealed by the Law of Property (Amendment) Act 1926, s.7, Sched.

LAW OF PROPERTY (AMENDMENT) ACT 1926

Meaning of
"trust
corporation."

15 Geo. 5.
c.19.

15 Geo. 5.
c.23. 1981
c.54.

3.—(1) For the purposes of the Law of Property Act 1925, the Settled Land Act 1925, the Trustee Act 1925, the Administration of Estates Act 1925, and the [Supreme Court Act 1981], the expression "Trust Corporation" includes the Treasury Solicitor, the Official Solicitor, and any person holding any other official position prescribed by the Lord Chancellor, and in relation to the property of a bankrupt and property subject to a deed of arrangement, includes the trustee in bankruptcy and the trustee under the deed respectively, and, in relation to charitable ecclesiastical and public trusts, also includes any local or public authority so prescribed, and any other corporation constituted under the laws of the United Kingdom or any part thereof which satisfies the Lord Chancellor that it undertakes the administration of any such trusts without remuneration, or that by its constitution it is required to apply the whole of its net income after payment of outgoings for charitable, ecclesiastical or public purposes, and is prohibited from distributing, directly or indirectly, any part thereof by way of profits amongst any of its members, and is authorised by him to act in relation to such trusts as a trust corporation.

(2) For the purposes of this provision, the expression "Treasury Solicitor" means the solicitor for the affairs of His Majesty's Treasury, and includes the solicitor for the affairs of the Duchy of Lancaster.

Note

Subs. (1): substitution made by the Supreme Court Act 1981, s.152, Sched.5.